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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION (MDL No. 2406)	**Master File No. 2:13-CV-20000-RDP** **This document relates to Provider-Track cases.**

DEFENDANTS' RESPONSE TO PROVIDER PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING THE PARTIES' MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON THE STANDARD OF REVIEW

On May 13, 2022, Providers filed a notice of supplemental authority in connection with the pending standard of review motions, pointing the Court to the Ninth Circuit's decision in *The PLS.com, LLC v. National Association of Realtors*, 32 F.4th 824 (9th Cir. 2022). (*See* Doc. 2918.) *PLS.com* is an out-of-circuit decision, and holds only that the complaint adequately pleaded a claim sufficient to survive a motion to dismiss. The decision is not binding on this Court and did not address (much less decide) the standard to be applied to any antitrust claim. As such, it does not affect the standard of review motions pending before this Court.

Nor does *PLS.com* stand for any of the propositions Providers claim.

First, Providers are wrong that *PLS.com* supports a *per se* standard for Providers' group boycott claim. (*See* Doc. 2918 at 1–2.) As stated above, the Ninth Circuit was not evaluating the appropriate standard of review, but rather was assessing the sufficiency of plaintiffs' allegations when taken as true. 32 F.4th at 837. In fact, the Ninth Circuit made this very point: "Although we hold that PLS has adequately alleged a *per se* group boycott, we leave to the district court to determine in the first instance whether it should apply *per se* analysis or rule of reason analysis at later stages in this litigation." *Id.* Providers twist this language to

argue that "[t]he Ninth Circuit recognized that whether the standard of review can be determined depends on the stage of the case." (*See* Doc. 2918 at 2.) That, of course, is not at all what the Ninth Circuit was saying. Rather, it was merely underscoring that allowing a *per se* claim to survive *a motion to dismiss* does not dictate the standard of review that will apply *at the merits stage*.

Second, to the extent Providers are attempting to use *PLS.com* to argue that the Court need not decide the standard of review applicable to the Blues' service areas (Doc. 2918 at 2), they are mistaken. As long as Providers have any claim for relief—whether for damages or an injunction—after April 27, 2021 (the date on which NBE was eliminated), the Court must decide the standard of review under which to evaluate those claims. By its own terms, the Court's April 2018 standard of review decision covers *only* the period when NBE was in effect.[1] (Doc. 2063 (SoR Op.) at 36–37 ("[T]he court need not decide whether the Blue Plans' service area allocations alone constitute a *per se* violation of Section 1" because "Plaintiffs have presented evidence of an aggregation of competitive restraints"); Doc. 2641 (Preliminary Approval Order) at 48 (with the elimination of NBE, the April 2018 "standard of review opinion would no longer apply").) And nowhere does *PLS.com*—a decision made at the pleading stage—ever suggest that a claim may be tried without an applicable antitrust standard.

Third, Providers' assertion that they need additional discovery before the Court can determine the post-NBE standard of review only confirms that the applicable standard must be the rule of reason. (Doc. 2918 at 3.) Indeed, *PLS.com* itself observes that the *per se* standard

[1] As the Court is aware, Defendants also maintain that the April 2018 Order should not apply to Providers' claims even for the period when NBE was in effect because, among other reasons, NBE was a subscriber-facing rule from which Providers have identified no damages. Moreover, there is not, and never has been, any restriction on unbranded competition on the Provider side of this two-sided market. (Doc. 2728 (Defs.' Opening SoR Br.) at 25–26.)

is limited to the very narrow set of cases where the restrictions are so plainly anticompetitive that they can be presumed such "without inquiry into the particular market context in which [they] are found." 32 F.4th at 833 (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984)). If Providers need further discovery into that market context—particularly after the years of discovery that has already taken place on Blue System service areas—that alone confirms that Blue System service areas are not a *per se* unlawful restraint. But that result is not surprising. After all, "[a]greements to protect trademarks . . . should not immediately be assumed to be anticompetitive"; instead, courts should "presume they are *procompetitive*." *1-800 Contacts, Inc. v. F.T.C.*, 1 F.4th 102, 116 (2d Cir. 2021).

Fourth, the Ninth Circuit in *PLS.com* did not "reject[]" Defendants' argument that "Providers' group boycott claim cannot be judged under the *per se* rule because there is a dispute about the proper definition of the relevant market." (Doc. 2918 at 1.) In opposing Providers' motion for summary judgment (Doc. 2760), Defendants argued, among other things, that Providers had not demonstrated one of the key requirements of a *per se* group boycott claim: evidence that the boycotting firms possess market power. (Doc. 2760 (Defs.' Opp. Br.) at 23–25.) Among other failures of proof on this issue, Providers never defined the relevant market—a market which, in this case, must account for both sides of a two-sided transaction platform. (*Id.*) *PLS.com* did not address this requirement, much less reject the relevance of two-sided market features when assessing market power. Rather, the defendant in *PLS.com* "d[id] not seriously dispute" that the plaintiff had "adequately alleged that they have market power." 32 F.4th at 835 n.5.

For all these reasons, the Ninth Circuit's decision in *PLS.com* is not instructive here, or only further supports Defendants on the renewed standard of review motions pending before the Court.

Dated: May 31, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

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/s/ *Evan R. Chesler*
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